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NOTE

From:	Commission services
To:	Law Enforcement Working Party (Police)
Subject:	Proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse – Supervision, enforcement and cooperation - coordinating authorities and competent authorities

Following the Law Enforcement Working Party on 29 March 2023, delegations will find hereafter a non-paper from the Commission services. The Commission will present it at the Law Enforcement Working Party on 13 April 2023.

This non-paper has been prepared by the Commission services to contribute to the inter-institutional negotiations. It has not been formally endorsed by the College of Commissioners. The position of the Commission remains that of its proposal presented on 11 May 2022.

Proposal for a Regulation to prevent and combat child sexual abuse:
Supervision, enforcement and cooperation - coordinating authorities and competent
authorities

Purpose

This non-paper aims to propose a possible way forward on the supervision, enforcement and cooperation system for the proposal that could accommodate the various concerns that Member States have expressed in the LEWP discussions.

The amendments made to the Commission proposal to try to accommodate the concerns of Member States have caused the text to depart from the logic of the original proposal. The amendments, however, seem to lack a coherent, new logic that could effectively work in practice.

The non-paper therefore aims to propose a logic for the tasks, requirements and powers of Coordinating Authorities (CAs) and competent Authorities (cAs) that is simple and flexible enough to ensure an efficient and effective implementation of the legislation while accommodating the Member States concerns.

To identify such logic, the document:

1. recalls the logic behind the Commission proposal;
2. recalls the rationale for the amendments to the Commission proposal made in Council and its main opportunities for clarification; and
3. proposes a new logic and concrete drafting suggestions for the consideration of Member States.

1. Logic behind the Commission proposal

Overview

The logic of the enforcement system in the Commission proposal had two pillars:

- Align as much as possible with the enforcement system under the proposal for the Digital Services Act (DSA). This would facilitate implementation, given the close relations between the two instruments, and the fact that the implementation of the DSA would be well advanced by the time the CSA proposal was adopted.
- A two-step system for the issuance of all orders (detection, removal and blocking):
 - i. CAs: preparation (but not issuance) of all the orders.
 - ii. Judicial or independent administrative authorities: issuance of all orders.

The Commission proposal did not include cross-border removal orders as these were not considered necessary, given the EU wide effect of the national removal orders. The Commission proposal did not include desilting orders either.

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Tasks

- CAs: in principle responsible for all matters related to application and enforcement of the Regulation in the Member State concerned. In any event, they are responsible for coordination at national level and cooperation at EU level.
- cAs: Member States could assign to cAs specific tasks or sectors under the Regulation.

Requirements

- CAs: fully independent.
- cAs: idem as CAs.

Powers

- CAs: a set of powers to allow them to fulfil their various tasks, very much inspired from a subset of those under the DSA.
- cAs: idem as CAs.

2. Rationale of amendments made in Council and main opportunities for clarification

Overview

The rationale of the amendments made in Council seemingly has two pillars:

- Ensure that the proposal can accommodate existing practices, notably the **issuance** of removal, blocking and delisting orders by law enforcement authorities (a type of cA). This is similar to the TCO approach where cAs can issue removal orders (but not other orders).
- Simplify the procedures for the issuance of removal and blocking orders, notably by reducing a number of safeguards and conditions compared to the Commission proposal.

The proposed amendments include the addition of cross-border removal orders and of delisting orders.

Tasks

- CAs: in the current Presidency text (Article 25), CAs appear as responsible for all matters related to application and enforcement of the Regulation in the Member State concerned, unless the Member State has assigned specific tasks to other cAs.
- cAs: the current text gives them the tasks to issue removal, blocking and delisting orders.

Requirements

- CAs: in the current Presidency text (Article 26), CAs are given limited independence requirements, idem as those of competent authorities in TCO.
- cAs: no independence requirements at all.

Powers

- CAs: in the current Presidency text (restructured Article 27), their powers are fully aligned with the corresponding ones under the DSA.
- cAs: idem as CAs.

Main opportunities for clarification include:

- If the cAs are given such important, fundamental rights-sensitive tasks as the issuance of the removal, blocking and delisting orders,
 - what are the tasks of CAs/cAs, and who can be a cA/CA?
 - what type of national arrangements would be possible to avoid the concerns expressed by Member States (e.g. FR, DK or NL)?
 - does it make sense to specify independence requirements only for CAs but not for cAs, when cAs are issuing removal, blocking and delisting orders?

3. Possible new logic and concrete drafting suggestions

Overview

A possible new logic would have the following two pillars:

- Enforcement system based on cAs, which would be responsible for all matters related to application and enforcement of the Regulation in the Member State concerned.
- One of the cAs will be designated as CA. As CA, it will serve as a coordinating body and contact point for both national and EU level, in addition to other tasks that as a cA is also fulfilling related to application and enforcement of the Regulation.

Tasks

- CAs: one type of cA, which serves as a coordinating body and contact point for both national and EU level.
- cAs: responsible for all matters related to application and enforcement of the Regulation in the Member State concerned. In particular, cAs can issue removal, cross-border removal, blocking and delisting orders. For detection orders, the Commission proposal is preserved and the CA of establishment asks a judicial or independent administrative authority to issue a detection order.

A possible way to take into account of the above would be to modify Article 25 of the proposal as follows, taking inspiration from the structure of Article 12(1) TCO, (in bold the modifications in relation to the current Presidency text):

*Article 25 - **Competent authorities***

- 1. Member States shall, by eighteen months from the date of entry into force of this Regulation, designate one or more competent authorities ('competent authorities') as responsible for the application and **for the supervision and enforcement of this Regulation ('competent authorities')**.*
- 2. **Where a Member State designates more than one competent authority, it shall appoint one of those competent authorities as Coordinating Authority. Where it designates only one competent authority, that competent authority shall be the Coordinating Authority.***

The Coordinating Authority shall **in any event**~~in any event~~ be responsible for ensuring coordination at national level in respect of ~~those matters~~ **all matters relating to the application, supervision and enforcement of this Regulation** and for contributing to the effective, efficient and consistent application, **supervision** and enforcement of this Regulation throughout the Union.

For that purpose, Coordinating Authorities shall sincerely, effectively and efficiently cooperate with each other, other national competent authorities, the EU Centre and the Commission, without prejudice to the possibility for Member States to provide for cooperation mechanisms and regular exchanges of views between the Coordinating Authorities and other competent² authorities where relevant for the performance of their respective tasks in accordance with this Regulation.

3. Where a Member State designates more than one competent authority~~in addition to the Coordinating Authority~~, it shall ensure that the respective tasks of those authorities, **including those of the Coordinating Authority**, are clearly defined and that they cooperate closely and effectively when performing their tasks.

4. Within one week after the designation of ~~the~~ competent authorities, **including the Coordinating Authority**, Member States shall make publicly available, and communicate to the Commission and the EU Centre, the names of ~~their~~**those** ~~competent~~ authorities as well as their respective tasks or sectors. They shall keep that information updated.

5. Member States shall establish a contact point within its Coordinating Authority's office to handle requests for clarification, feedback and other communications in relation to all matters related to the application and enforcement of this Regulation. Member States shall make the information on the contact point publicly available and communicate it to the EU Centre. They shall keep that information updated.

6. Within two weeks after the designation of the Coordinating Authorities pursuant to paragraph 2, the EU Centre shall set up an online register listing the Coordinating Authorities and their contact points. The EU Centre shall regularly publish any modification thereto.

7. Competent authorities may, where necessary for the performance of their tasks under this Regulation, request, **through the Coordinating Authority**, the assistance of the EU Centre in carrying out those tasks, in particular, by requesting the EU Centre to:

- (a) provide certain information or technical expertise on matters covered by this Regulation;
- (b) assist in assessing, in accordance with Article 5(2), the risk assessment conducted or updated or the mitigation measures taken by a provider of hosting or interpersonal communication services under the jurisdiction of the Member State that designated the requesting **competent authority**;

¹ Better to leave the words 'in any event'. Given that CAs are cAs, their tasks include at least some of the tasks listed in para. 1. We could further spell this out by adding: '..., in addition to the tasks designated pursuant to paragraph 1,

² Changed to 'competent' from 'national'

- (c) *provide opinion on the possible need to request competent national authorities to issue a detection order in respect of a service under the jurisdiction of the Member State that designated that **competent authority**;*
- (d) *provide opinion on the effectiveness of a detection order issued upon the request of the requesting **competent authority**.*

8. *The EU Centre shall provide such assistance free of charge and in accordance with its tasks and obligations under this Regulation.*

The above text also makes it clear that Member States are free to have only one competent authority at national level. If this is the choice of the Member State, then the one competent authority will carry out all the relevant functions under the regulation, including coordination.

Requirements

- CAs: CAs are cAs that perform, in addition, the contact-point/coordination function, which does not seem to justify or require higher independence requirements. Therefore, CAs and cAs should have the same independence requirements.
- cAs: since cAs are responsible for the issuance of (cross-border) removal, blocking and delisting orders, which can be sensitive given the possible interference with fundamental rights, cAs should have **at least** the same functional independence requirements that are imposed on competent authorities by the TCO regulation. It is advisable to add an express reference to the need to fairly balance the fundamental rights at stake.

In practice, this means that Article 26(1) should read:

*Member States shall ensure that the **competent authorities** that they have designated, **including Coordinating Authorities**, carry out their tasks under this Regulation in an objective and non-discriminatory manner, while fully respecting fundamental rights, **in particular by ensuring a fair balance between the fundamental rights of all parties affected**. Member States shall ensure that ~~the~~**those authorities** have adequate technical, financial and human resources to carry out their tasks.*

***Those authorities** shall not seek or take instructions from any other body in relation to carrying out their tasks under this Regulation.*

It could be further clarified in the recitals that the broadest level of flexibility is left to Member States in relation to the designation of authorities of different nature as cAs:

- Depending on the national preferences and constitutional requirements, some Member States might chose to designate law enforcement authorities as cAs for the issuance of removal, blocking or delisting orders. Other Member States may decide that such orders are issued by a judicial authority at the request of a cA. This could be made explicit in the relevant articles and/or corresponding recitals,

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- In other words, it would be entirely up to Member States to decide what kind of authority is competent for each task under the Regulation. The functional independence requirements in Article 26(1) for all cAs are only a minimum standard and would not prevent fully independent authorities from being given specific tasks in specific Member States.
- As the Digital Service Coordinators certainly have to comply with these minimal functionally independence requirements under the DSA (Article 50 DSA imposes further independence requirements), nothing prevents Member States from designating them as cAs, including as CAs, if they so see fit.

Powers

- CAs: idem as the powers for cAs, plus any power that the Member State considers necessary to carry out the contact-point/coordination function.
- cAs: where a Member State has designated a specific task to the cAs, they have the powers described in the Regulation necessary for the performance of that task.

The current Presidency text aligned with the DSA could be maintained, changing only

“...Coordinating Authorities or other competent authorities shall have the following powers...”

for

*“...**competent authorities, including Coordinating Authorities**, shall have the following powers...”*

SEPRES noted that some of the enforcement and investigatory powers of competent authorities are close to those of national law enforcement authorities. In this respect it is important to note that:

- The proposal refers to administrative investigations/collection of information for the purpose of imposing administrative penalties. As such, the powers attributed to competent authorities do not seem to be overlapping with core police functions and powers;
- Most Member States may designate law enforcement authorities as competent authorities in relation to fulfil some of the tasks under the Regulation and, as a consequence, to exercise the relevant investigatory and enforcement powers.
- Again, Member States would have flexibility to tasks to the cAs (including CAs), in which case they have the corresponding powers under the Regulation.

To conclude, the proposed logic centred on cAs addresses the main opportunities for clarification identified in the current Council text, by providing for simplicity and a maximum level of flexibility in the allocation of tasks and powers and the designation of cAs:

- what are the tasks of CAs/cAs, and who can be a cA/CA?
 - All Member States would be able to leverage existing structures to the extent possible and adapt the model to their national systems.
- what type of national arrangements would be possible to avoid the concerns expressed by Member States (e.g. FR, DK or NL)?

- Each Member State having expressed specific constitutional or other concerns should be able to respect them, for example:
 - NL could designate a judicial authority to issue removal or blocking orders, at the request of a competent authority,
 - FR and DK could have a national independent administrative authority reviewing cross-border removal orders (Article 14a(3), modelled on TCO). This approach being in line with TCO, should be acceptable to both Member States.
- does it make sense to specify independent requirements only for CAs but not for cAs, when cAs are issuing removal, blocking and delisting orders?
 - All authorities would – as a minimum standard – be functionally independent in the performance of their task, in line with what is required by TCO. Each Member State could chose to go further in terms of independence requirements, for all cAs or some of them, including CAs.
